

No. 17362

United States
Court of Appeals
for the Ninth Circuit

FAYE LYONS,

Appellant,

vs.

ELSINORE C. MACHRIS GILLILAND, also known
as Elsinore Machris Gilliland,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

NOV 24 1961

FRANK H. SCHMID, CLERK



No. 17362

**United States
Court of Appeals**
for the Ninth Circuit

FAYE LYONS,

Appellant,

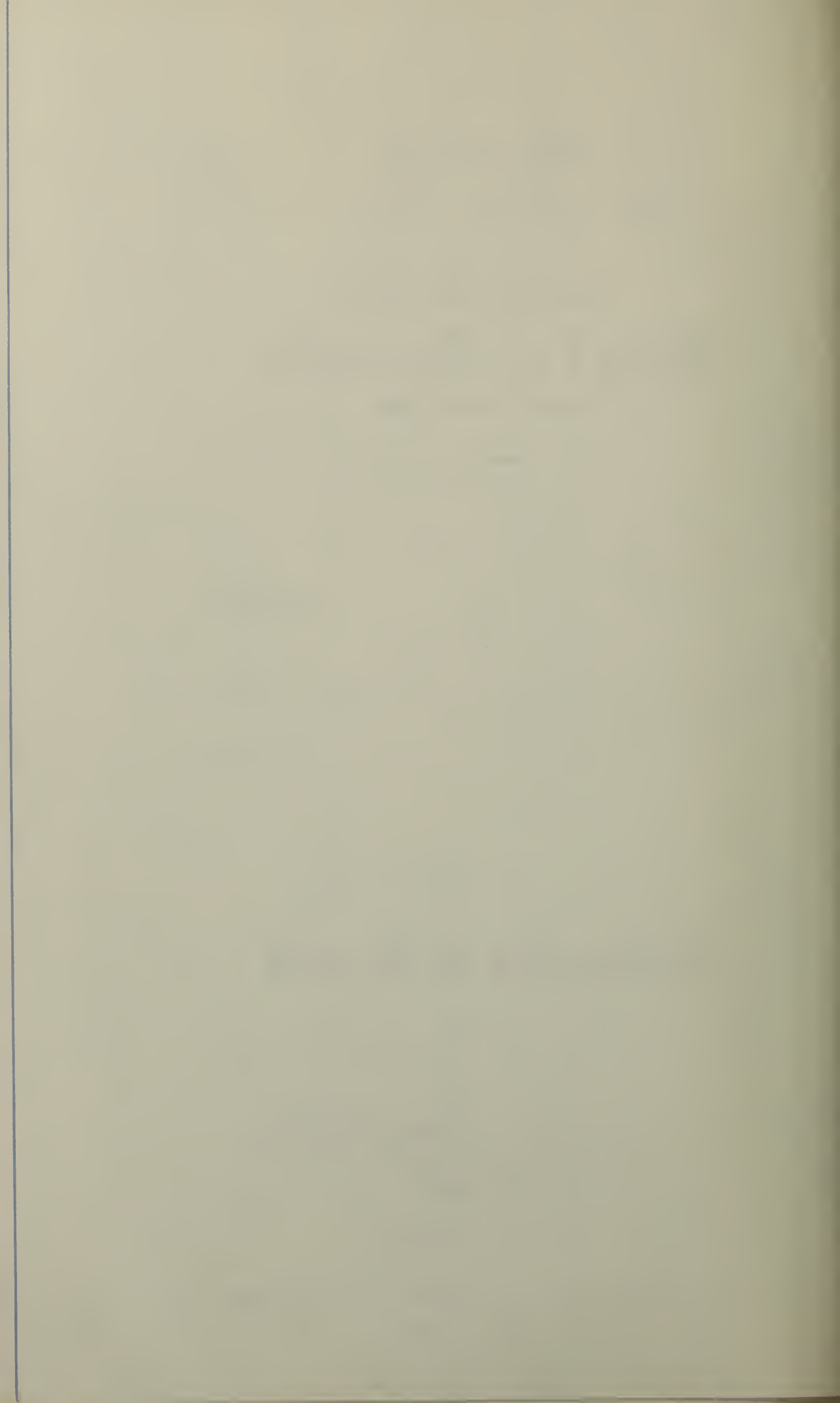
vs.

ELSINORE C. MACHRIS GILLILAND, also known
as Elsinore Machris Gilliland,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WELBURN MAYOCK,
W. S. MAYOCK,

524 So. Spring Street,
Los Angeles 13, California.

For Appellee:

LARWILL & WOLFE,
CHARLES W. WOLFE,
GEORGE R. LARWILL,

453 South Spring Street,
Los Angeles 13, California.



United States District Court,
Southern District of California,
Central Division

No. 20301 PH

FAYE LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also known
as ELSINORE MACHRIS GILLILAND,

Defendant.

AMENDED COMPLAINT

(Libel—Invasion of Privacy—Slander)

Comes Now the plaintiff and for her cause of action
alleges the following:

I

Jurisdiction exists in the above entitled Court by reason that plaintiff is a citizen of the State of Florida, County of Dade, and defendant is a citizen of the State of California, County of Riverside. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II

That the defendant, on or about the 29th day of March, 1955, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to wit: "Ray is shacking up with Faye Lyons." That the defend-

ant, on or about the 10th day of August, 1955, at Palm Springs, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to wit: "Ray is shacking up with Faye Lyons." That the defendant, on or about the 26th day of November, 1955, at Los Angeles, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff and false and malicious words following, to wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as "Ray Gilliland and Family." That the defendant, on or about the 21st day of December, 1955, at Riverside, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following to wit: "Ray is being punished for sleeping with Faye Lyons." That the defendant, on or about the 14th day of February, 1956, at Scottsdale, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to wit: "Ray shackd up with Faye Lyons."

That the defendant, on or about the 15th day of May, 1956, at Scottsdale, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words, following to wit: "Ray shackled up with Faye Lyons." That the defendant, on or about the 26th day of March, 1956, at Phoenix, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to wit: "Ray shackled up with Faye Lyons."

III

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV

That by means of the published of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Second Cause of Action

Comes Now the plaintiff and complains and alleges as follows for her second cause of action herein.

I

Incorporates herein by reference as completely as though set forth herein in full, Paragraphs I, II, III, IV and V of her first cause of action herein.

II

That, on or about the 26th day of November, 1955, at the City of Los Angeles, County of Los Angeles, State of California, the defendant Elsinore C. Machris Gilliland, also known as Elsinore Marchris Gilliland, well knowing the premises, in a certain discourse in the presence and hearing of diverse persons, maliciously spoke, wrote and verified and published of and concerning the plaintiff the false and malicious words following, to wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were regis-

tered by him as "Ray Gilliland and Family." That plaintiff herein was never served in said divorce proceeding nor did defendant endeavor to serve said plaintiff nor was plaintiff given an opportunity to defend her good name in the matter nor assuage her feelings by being given the opportunity to defend as required by the Statutes of the State of California.

III

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Third Cause of Action

Comes Now the plaintiff and complains and alleges as follows for her third cause of action herein.

I

Incorporates herein by reference as completely as though set forth herein in full, Paragraph I, II, III, IV and V of her first cause of action and Paragraphs I, II, III, IV and V of her second cause of action.

II

That defendant, Elsinore C. Machris Gilliland, sought newspaper publicity, gave interviews to the press, endeavored to have her story written in the magazine known as Confidential for, as she often said, "Her public must be informed." That by reason of her endeavors, there was published in a newspaper of general circulation on or about March 23, 1956, as well as spoken and plead by the defendant, the following, to wit:

"In her counter complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix.

Named as co-respondents in the counter complaint were "Ann (Peggy) Meyers" and "Faye Lyons."

In an affidavit, Mrs. Gilliland stated she had an annual income of \$267,000 in 1954 and requires at least \$10,000 a month subsistence."

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony

under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Hundred Thousand Dollars (\$500,000.00), as compensatory damage, and for the sum of Five Hundred Thousand Dollars (\$500,000.00) as exemplary and punitive damages, for costs of suit, and for such other and further relief as to the Court may deem just and equitable in the premises.

/s/ COIT I. HUGHES,

Attorney for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 20, 1956.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

For answer to plaintiff's Amended Complaint, defendant admits, denies, and alleges as follows:

As to the First Cause of Action

I

For answer to the allegations in Paragraph I of plaintiff's First Cause of Action, defendant admits that she is a citizen of the State of California, County of Riverside. Defendant alleges that she has no knowledge or information sufficient to form a belief as to the balance of the allegations in said Paragraph I, and basing her denial on said lack of information or belief, denies each and every other allegation contained in said Paragraph I.

II

For answer to the allegations in Paragraph II and III of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraphs contained.

III

For answer to the allegations in Paragraph IV of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's First Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

IV

For answer to the allegations in Paragraph V of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that she did the things alleged in the First Cause of Action or any of them, and specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00 or in any sum whatsoever or at all.

V

First Affirmative Defense to the First Cause
of Action

Defendant is informed and believes and upon such information and belief alleges that each and all of the supposed defamatory words set forth in the First Cause of Action in plaintiff's Amended Complaint are true.

As to the Second Cause of Action

I

For answer to the allegations in Paragraph I of plaintiff's Second Cause of Action, defendant readopts and reasserts the allegations and denials hereinabove set forth in Paragraphs I, II, III, and IV of her Answer to the First Cause of Action herein.

II

For answer to the allegations in Paragraph II of plaintiff's Second Cause of Action, defendant admits and alleges that on or about November 26, 1955, there was pending in the Superior Court of the State of California, in and for the County of Riverside, an action for divorce against defendant on a complaint for

divorce filed on or about October 21, 1955, being action No. 62839 on the register of actions in the office of the Clerk of said court entitled: "George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, vs. Elsinore C. Marchris Gilliland, also known as Elsinore Marchris Gilliland, First Doe to Sixth Doe inclusive, Defendants."

That defendant's attorneys prepared a cross-complaint for divorce in said divorce action No. 62839 on defendant's behalf in which plaintiff herein, Faye Lyons, and one Ann Meyers were named as Co-Respondents in the Second Cause of Action in said cross-complaint for divorce. That the Second Cause of Action in said cross-complaint for divorce in said divorce action No. 62839 contained the following allegation:

"That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.' "

That on or about November 28, 1955, defendant verified said cross-complaint, and on or about November 28, 1955, said cross-complaint was filed in said divorce action No. 62839 by her attorneys.

Further answering the allegations of Paragraph II of the Second Cause of Action defendant admits that

plaintiff herein was not served in said divorce action No. 62839. Defendant alleges that defendant did endeavor to serve plaintiff herein in said divorce action No. 62839. Defendant is informed and believes and upon such information and belief alleges that defendant's attorneys diligently endeavored to ascertain plaintiff's address and place of residence, but were unable, after due diligence, to locate or ascertain the place of residence of plaintiff in order to serve here; defendant alleges that plaintiff has, since shortly after November 29, 1955, had full knowledge of the pendency of said Second Cause of Action of said cross-complaint in divorce action No. 62839, and has not made any appearance therein, although plaintiff has had full and complete opportunity to do so.

Defendant alleges that the parties to said divorce action No. 62839, on or about June 12, 1956, entered into a property settlement agreement, mutually satisfactory to both parties, in which defendant's then husband, George Chester Gilliland, agreed to dismiss with prejudice his complaint for divorce and any affirmative relief sought in his answer to the cross-complaint filed in said action No. 62839; that the plaintiff in said action No. 62839 stipulated in writing that the first cause of action of said cross-complaint based upon extreme cruelty be heard as a default, and on June 13th, 1956, said divorce action was so tried on the issues of the first cause of action of the cross-complaint, and an interlocutory decree of divorce was granted to defendant herein and was entered on June 13, 1956, in Judgment Book 76 Page 630, of the Superior Court of the State of California, in and for the County of Riverside. De-

defendant alleges that said Second Cause of Action in said divorce action No. 62839 has not been dismissed and is still pending.

Defendant denies each and every other allegation in said Paragraph II of plaintiff's Second Cause of Action not hereinabove expressly admitted and alleged.

III

For answer to the allegations in Paragraph III of plaintiff's Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained.

IV

For answer to the allegations in Paragraph IV of the Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's Second Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

V

For answer to the allegations in Paragraph V of the Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00 or in any sum whatsoever or at all.

VI

First Affirmative Defense to the Second
Cause of Action

That the substance of the supposed defamatory words set forth in the Second Cause of Action herein were incorporated as allegations in a cross-complaint for divorce filed in said action No. 62839 on the register of actions in the Superior Court of the State of California, in and for the County of Riverside, in exact words as follows:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as ‘Ray Gilliland and Family.’ ”

That said allegation is a privileged publication under the provisions of section 47 subd. 2(3) of the Civil Code of the State of California, in the following facts which defendant hereby alleges:

1. That said cross-complaint for divorce was verified by defendant;

2. That the allegations of the supposed defamatory words in said cross-complaint for divorce were made by defendant in good faith and without malice;

3. That at the time the allegations of the supposed defamatory words in said cross-complaint for divorce were made, defendant had good and sufficient reason to believe and did honestly and reasonably believe that said allegations were true, and defendant had reasonable and probable cause for believing the truth of said allegations;

4. That the allegations of the supposed defamatory words in said cross-complaint for divorce were material and relevant to the issues in said action No. 62839;

5. That defendant did not in any other way publish the supposed defamatory words alleged in the Second Cause of Action of the Amended Complaint herein.

VII

Third Affirmative Defense to the Second Cause of Action

That the Second Cause of Action fails to state a claim against the defendant upon which relief can be granted.

As to the Third Cause of Action

I

For answer to the allegations of Paragraph II of Plaintiff's Third Cause of Action, defendant admits and alleges that on March 23, 1956, there was published in the Daily Enterprise, a newspaper of general circulation in Riverside, California, a news article describing a hearing on March 22, 1956, in the Superior Court of the State of California, in and for the County of Riverside, the hereinbefore described action No. 62839, and that said article contained, among other statements, substantially the words set forth in quotations in Paragraph II of plaintiff's Third Cause of Action herein.

Except as hereinabove expressly admitted and alleged, defendant denies each and every other allegation in said Paragraph II of plaintiff's Third Cause of Action, and specifically denies that defendant had anything at all to do with said newspaper publication, and specifically denies that said newspaper publication was "by reason of her endeavors," in any manner whatsoever.

III

For answer to the allegations in Paragraph III of plaintiff's Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained.

IV

For answer to the allegations in Paragraph IV of the Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's Third Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

V

For answer to the allegations in Paragraph V of the Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that she did the things alleged in the Third Cause of Action or any of them, and specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00, or in any sum whatsoever or at all.

VI

First Affirmative Defense to Third
Cause of Action

Defendant is informed and believes and upon such information and belief alleges that the supposed defamatory words set forth in plaintiff's Third Cause of Action are true.

VII

Second Affirmative Defense to Third Cause
of Action

That the substance of the supposed defamatory words set forth in the Third Cause of Action were incorporated as allegations in the Second Cause of Action of a cross-complaint for divorce filed in said action No. 62839, on the register of actions in the Superior Court of the State of California, in and for the County of Riverside, in exact words as follows:

“That, in May and June 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as ‘Ray Gilliland and Family.’ ”

That said allegation is a privileged publication under the provisions of section 47 subd. 2(3) of the Civil Code of the State of California, in the following facts which defendant hereby alleges:

1. That said cross-complaint for divorce was verified by defendant;

2. That the allegations of the supposed defamatory words in said cross-complaint for divorce were made by defendant in good faith and without malice;

3. That at the time the allegations of the supposed defamatory words in said cross-complaint for divorce were made the defendant had good and sufficient reason to believe and did honestly and reasonably believe that said allegations were true, and defendant had reasonable and probable cause for believing the truth of said allegations;

4. That the allegations of the supposed defamatory words in said cross-complaint for divorce were material and relevant to the issues in said action No. 62839;

5. That defendant did not in any other way publish the said supposed defamatory words.

VIII

Third Affirmative Defense to Third Cause of Action

That the Third Cause of Action fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that plaintiff take nothing by her action, and that defendant have judgment against plaintiff for her costs of suit, and for such other and further relief as to the court may seem just.

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Attorneys for Defendant.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 28, 1956.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO
AMENDED COMPLAINT

As an amendment to her answer to the second cause of action of plaintiff's amended complaint, defendant alleges as follows:

VIII

Fourth Affirmative Defense to the Second
Cause of Action

The allegation contained in paragraph II of the second cause of action of plaintiff's amended complaint, to wit, "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; . . ." is true.

WM. L. MURPHEY and
JOHN B. ANSON,
LARWILL AND WOLFE,

/s/ By WM. L. MURPHEY,
Attorneys for Defendant.

Receipt of Copy.

[Endorsed]: Lodged May 20, 1960. Filed June 20,
1960.

United States District Court
Southern District of California
Central Division

No. 20301-WM Civil

FAYE LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also known
as ELSINORE MACHRIS GILLILAND,

Defendant.

VERDICT

We, the jury in the above entitled cause, find that the defense of truth of the alleged libel has not been established, but that the defense of privilege has been established, and therefore find in favor of the defendant, Elsinore C. Machris Gilliland.

Los Angeles, California.

February 7, 1961.

/s/ C. L. CHURCHILL,
Foreman of the Jury.

[Endorsed]: Filed Feb. 7, 1961.

United States District Court
Southern District of California
Central Division

No. 20301 PH

FAYE LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also known
as ELSINORE MACHRIS GILLILAND,

Defendant.

JUDGMENT ON VERDICT

This action came on for trial on 31 January 1961, in the above-entitled Court before said Court and a jury, and said action having been tried and the jury, on 7 February 1961 having duly rendered its verdict finding that the defense of truth of the alleged libel has not been established, but that the defense of privilege has been established, and therefore finding in favor of the defendant, Elsinore C. Machris Gilliland,

It Is Therefore Ordered, Adjudged and Decreed:

That the plaintiff Faye Lyons, take nothing herein and that the defendant Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, have judgment against plaintiff, Faye Lyons, for her costs herein, taxed by the Clerk on June 16, 1958 in the sum of \$200.12, and on February 1961 in the sum of \$.....

Witness, The Honorable Wm. C. Mathes, United States District Judge, Southern District of California, this 10th day of February 1961. Costs taxed \$203.03.

JOHN A. CHILDRESS,
Clerk.

/s/ By B. T. ERICKSEN,
Deputy Clerk.

Approved as to form:

/s/ WELBURN MAYOCK,
Attorney for Plaintiff.

Receipt of Copy.

[Endorsed]: Filed and Entered Feb. 10, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fay Lyons, the plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment on the verdict entered in this action on February 10, 1961.

Dated: March 24, 1961.

WELBURN MAYOCK,
W. S. MAYOCK,
/s/ By WELBURN MAYOCK,
Attorneys for Plaintiff & Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 24, 1961.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD TO BE PRINTED

Appellant hereby designates the following portions of the record to be contained in the record on appeal:

1. Amended Complaint, filed 11/20/56
2. Answer to Amended Complaint, filed 12/28/56
3. Amendment to Answer to Amended Complaint, filed 6/20/60
4. Verdict
5. Judgment
6. Order on Plaintiff's Motion for New Trial
7. Notice of Appeal
8. Plaintiff's exhibits 1 to 13, inclusive
9. Defendant's exhibits A to F, inclusive
10. The following portions of the reporter's official transcript of proceedings: February 2, 3, and 6, 1961, to wit: testimony of all witnesses for plaintiff and testimony of all witnesses for defendant
11. This Designation of Contents of Record on Appeal.

Dated: April 6, 1961.

Respectfully submitted,

WELBORN MAYOCK,
W. S. MAYOCK,

Attorneys for Plaintiff & Appellant,
/s/ By WELBURN MAYOCK.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 6, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

- 1 Names and Addresses of Attorneys
- 2 Amended Complaint, filed 11/20/56
- 10 Answer to Amended Complaint, filed 12/28/56
- 20 Amendment to Answer to Amended Complaint, filed 6/20/60
- 22 Verdict, filed 2/7/61
- 23 Judgment on the Verdict, filed and entered 2/10/61
- 25 Order on Motion of Plaintiff for a New Trial, filed 2/27/61
- 26 Notice of Appeal, filed 3/24/61
- 28 Appellant's Designation of record to be printed, filed 4/6/61
- 31 Affidavit of W. S. Mayock in support of request for order extending time to file record and docket appeal, filed 5/3/61
- 33 Order extending time to file record and docket appeal, filed 5/3/61

Two volumes of Reporter's transcript of proceedings had on:

January 31 and February 2, 1961—Volume 1

February 3 and 6, 1961—Volume 2

Plaintiff's Exhibits 1, 2-A to 2-E, 3 to 13 inclusive.

Defendant's Exhibits A to F inclusive.

Dated: May 5, 1961.

[Seal]

JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 17362. United States Court of Appeals for the Ninth Circuit. Fay Lyons, Appellant, vs. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 6, 1961.

Docketed May 16, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 17362

(U.S. Dist. Ct. No. 20301-WM)

FAY LYONS,

Appellant,

vs.

ELSINORE C. MACHRIS GILLILAND, also known
as ELSINORE MACHRIS GILLILAND,

Respondent.

NOTICE OF MOTION

To Elsinore C. Machris Gilliland, aka Elsinore Machris, Gilliland, and to Charles W. Wolfe and George R. Larwill, her Attorneys:

You and each of you will please take notice that on Monday, July 24, 1961 at 10 a.m. of that day in the court room of said Honorable Court, U. S. Postoffice and Courthouse, San Francisco 1, California, Appellant will move said Honorable Court for an Order permitting Appellant to proceed on the following record:

1. A printed judgment-roll containing the Amended Complaint, Answer to Amended Complaint, Amendment to Answer to Amended Complaint, Verdict, Judgment, Certificate of Clerk to Transcript of Record, Notice of Appeal, and Designation of Record to be Printed;

2. The typewritten Reporter's Transcript;
3. The original Exhibits.

Dated: July 10, 1961.

WELBURN MAYOCK,
W. S. MAYOCK,

/s/ By WELBURN MAYOCK,
Attorneys for Appellant.

Ordered: Acquitted 7-19-61.

Barnes,
C. J.

[Endorsed]: Filed July 12, 1961. Frank H. Schmid,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF POINTS ON APPEAL

Appellant hereby designates the following points to be urged on appeal:

I. The verdict that the defamatory publication of the libel was privileged as to defendant is not supported by the evidence and is against law.

It was found that the charge of adultery was not true.

Only evidence known to the defendant at the time of the publication is available to establish privilege. Defendant's attempt to justify a reasonable inference upon

which to base the defense of "privilege" fails of the essential element of "propensity" on the part of the parties. "Propensity" on the part of Mr. Gilliland was known to the defendant.

There is no evidence of "propensity" on the part of the plaintiff.

Propensity of both is essential to prove adultery by indirect evidence.

II. The jury has found that the charge of adultery was not true. There is no legal basis in the evidence to support a verdict of "privilege".

The only undecided issue for a new trial is the issue of damages. It is urged that the judgment be reversed and that a new trial be ordered on the single issue of damages.

Dated: November 15, 1961.

Respectfully submitted,

WELBURN MAYOCK and
W. S. MAYOCK,

/s/ By W. S. MAYOCK,
Attorneys for Appellant.

[Endorsed]: Filed November 17, 1961. Frank H. Schmid, Clerk.